

AGENDA PAPER

Item Number: 7
Date of Meeting: 10 June 2021
Subject: Project Proposal APES 215 *Forensic Accounting Services*

Action required For discussion For noting For information

Purpose

To:

- update the Board on a request from the Australian Securities and Investments Commission (ASIC) to amend specific examples in APES 215 *Forensic Accounting Services* (APES 215);
- highlight to the Board other aspects of APES 215 that may require further consideration and potential amendments; and
- obtain the Board's approval to commence a project to update APES 215 and include these matters on the APESB's Issues Register.

Background

APES 215 was originally issued in December 2008 and revised in December 2013, December 2015 and July 2019.

During exposure in 2012-2013, a key stakeholder raised various concerns, including in respect of employees who are members in business providing forensic accounting services and legal precedence of expert evidence or other evidence. These matters were considered at the August 2013 Board meeting ([Agenda Item 2](#)) and were communicated and subsequently addressed with the key stakeholder by Technical Staff at the [request of the Board](#).

The revisions in December 2013 to APES 215 were substantive and included that expert witnesses may provide opinions or other evidence, amendments to various definitions and the inclusion of a definition of Other Evidence. Appendix 1, dealing with facts, assumptions, and opinions, was revised. A new Appendix 2 was added with a schematic diagram to assist practitioners in determining the type of forensic accounting service. A new Appendix 3 was added with examples of a range of scenarios for forensic accounting services.

Revisions to APES 215 in December 2015 were less substantive. They included a paragraph on the objective of the Standard, minor amendments to definitions, minor updates to certain paragraphs to reflect changes in the Code and to add a requirement to include a statement in

the Expert Witness Services Report about the Member's training, study or experience relevant to the evidence provided.

[APES 215](#) was last revised on [31 July 2019](#) predominantly to align to the restructured Code, adding provisions to require members to comply with NOCLAR provisions in the Code and for drafting consistency with other APESB pronouncements.

Matters for Consideration

Engagement with ASIC

ASIC contacted technical Staff in February 2021 to discuss APES 215. A meeting was held on 10 March 2021 between ASIC's Chief Accountant, Doug Niven, ASIC Senior Manager, Forensic Accounting Services (FAS), Kathleen Clough and APESB Technical Staff to discuss ASIC's concerns.

ASIC's concerns were formalised in emails from Ms Clough on 12 and 22 April 2021 (Agenda Item 7(a)). ASIC's contentions are based on the findings in *Idyllic Solutions Pty Ltd & Ors – Australian Securities and Investments Commission v Hobbs [2012] NSWSC 568* (ASIC v Hobbs).

Much of the work undertaken by ASIC's FAS officers when providing evidence to the court particularly reflects Example 7 in Appendix 3 of APES 215 (and to an extent Example 6). FAS officers prepare and provide evidence to the court by way of summarising the flow of funds through bank accounts, tracing the use of these funds and only use information directly from the source documents such as bank statements and bank vouchers to explain each transaction (i.e., they do not make inferences in relation to the transactions).

ASIC Staff states that this evidence is adduced to the court under section 50 of the *Evidence Act 1995* (Cth) (Proof of voluminous or complex documents). This section enables evidence to be adduced of the contents of 2 or more documents as a summary if the court is satisfied it would not be possible to conveniently examine otherwise due to the volume or complexity of the documents. The opinion rule does not apply to evidence adduced under section 50 and is separate to the exception to providing opinion evidence to the court based on specialised knowledge (section 79 of the *Evidence Act 1995* (Cth)).

The high-level principles raised in *ASIC v Hobbs* were whether evidence summarising voluminous or complex underlying documents can be adduced under section 50 of the *Evidence Act 1995* (NSW)¹ where it is:

- a document prepared through a process involving judgement or application of a calculation is a summary – it was held that if the document prepared:
 - included the simple application of arithmetical formula it is a summary (for example summing up the total of columns);
 - involves the exercise of judgement or opinion; it is not a summary.
- a document summarising other documents is a summary – held it is a summary; and
- a conclusion based on underlying documents is a summary – held it is not a summary.

¹ Note this is the same as section 50 of the *Evidence Act 1995* (Cth).

The main concerns raised by ASIC in respect of APES 215 are:

- ASIC contends the following example in the [definition of Other Evidence](#) in APES 215 would likely not be treated as expert evidence by the court as it summarises data from the underlying documents and adds nothing further:

An example might be where a Member provides a summary of sales, by month, by product, by geography, based on the information contained within a series of invoices and a general ledger. Whilst it may be a matter of fact as to what sales were made, the extraction and summary of this information is facilitated by the Member's specialised knowledge.

- The following [examples in Appendix 3](#) to APES 215:

Example 6 – Member employed by/engaged by a law enforcement/regulatory body to provide a summary of complex transactions for Proceedings. ASIC believe further information is required to distinguish between a lay witness service (i.e., a summary only that includes information directly from the underlying documents) and an expert witness service where the Member has drawn inferences.

Example 7 - Member employed by/engaged by a law enforcement/ regulatory body to provide a summary of a flow of funds for Proceedings. Same arguments as Example 6.

Technical Staff are of the view there is merit in the matters raised by ASIC and that changes to the example in the definition of Other Evidence and to delineate Examples 6 and 7 should be explored further with the APES 215 Taskforce and ultimately via an exposure draft.

Potential other considerations with APES 215

Technical Staff raised the above matters with APESB Board member Brian Morris due to his forensic accounting expertise. Mr Morris undertook a detailed analysis of *ASIC v Hobbs* and APES 215 and supports a review of the Standard to address ASIC's concerns.

Mr Morris has also identified other matters with APES 215 that he believes should be considered and addressed, as summarised below.

Definitions of Lay Witness, Lay Witness Services, Expert Evidence and Other Evidence

APES 215 defines Lay Witness and Lay Witness Services. The latter includes evidence other than expert evidence involving giving evidence within the Member's professional knowledge directly observed or perceived by the Member. The Standard also uses lay evidence; however, this is not defined.

Lay opinion is another exception to the opinion rule under section 78 of the *Evidence Act 1995* (Cth) and is based on what the person saw, heard or otherwise perceived, but does not relate to being within that person's professional knowledge. The use of lay evidence in APES 215 may therefore need to be reconsidered.

Most evidence received by the court from an accountant will be opinion evidence (under 79 of the *Evidence Act 1995* (Cth)), where the court needs accounting expertise to interpret the materials. Accountants may present straightforward evidence, which arguably does not include judgement or opinion. However, if the witness has relevant expertise, it is highly likely the accountant will be presented as an expert and accepted as expert evidence.

The example raised by ASIC where the evidence is adduced under section 50 of the *Evidence Act 1995* (Cth) (Proof of voluminous or complex documents) is very much an exception to the rule.

Whether the accountant is deemed an 'expert' because of expertise is separate from deciding whether the accountant is an Expert Witness. The accountant may be an interested party in an action, an officer or an employee of a party, and therefore cannot and is not expected to be independent or seen as an independent expert.

Definition of Consulting Expert and Consulting Expert Service

APES 215 includes definitions for Consulting Expert and Consulting Expert Services, and the latter includes '*acting as an adviser, an arbitrator, a mediator, a member of a professional tribunal, an expert in an expert determination, a referee or in a similar role*'.

A person with relevant expertise, such as a member, may be retained as a consultant to advise and assist but is not presented to give evidence in a proceeding and is generally described as a 'consulting expert'. That person has obligations to the retaining party and is wholly partisan. While APES 215 includes 'adviser', it may not adequately distinguish this role.

Further, the other roles in the definition of Consulting Expert Services including arbitrators or mediators, whilst not presenting materials to the court, how these parties operate is very different to the 'consulting expert'.

Way Forward

Subject to the Board's approval Technical Staff propose to:

- facilitate a working party meeting with APES 215 Taskforce members in July 2021;
- draft relevant amendments to APES 215 subsequent to the working party meeting;
- convene a full APES 215 Taskforce meeting to consider proposed amendments to APES 215 in August 2021; and
- prepare a proposed Exposure Draft for APES 215 to be considered for approval at the September 2021 Board meeting.

Recommendations

The Board:

- note the update on Technical Staff engagement with ASIC in respect of specific examples in APES 215 and other aspects of APES 215 that require consideration and potential amendments; and
- approve Technical Staff to commence a project to update APES 215 and include these matters on the APESB Issues Register; and
- approve Technical Staff's proposed way forward.

Materials presented

Agenda Item 7(a) ASIC Request to Change Examples in APES 215

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